No. 84-735

In the Supreme Court of the United States

OCTOBER TERM, 1984

HOUSE OF PRIME RIB, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Statute:

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Petitioner disputes the findings of the lower courts that it would have hired several black applicants in the absence of intentional discrimination, and that its actions — rather than those of the applicants' union — led to its failure to hire the applicants.

1. Petitioner is a restaurant in San Francisco. In June 1979, a bartender who had been employed by petitioner quit. Gus Stathis, petitioner's assistant manager, accordingly contacted Local 2 of the Hotel, Restaurant Employees & Bartenders Union (the Union) requesting referrals to replace the departing bartender.[1] Between June 14 and June

[1]Under its collective bargaining agreement with the Union, petitioner must notify the Union of any bartending vacancies and must consider all applicants referred to it by the Union. Only " 'if the Union is not able to provide competent help suitable for the position to be filled' may the employer hire persons not referred by the Union." Pet. App. C, Finding of Fact 8.

18, 1979, the Union referred three black applicants to petitioner. Pet. App. C, Findings of Fact 5, 10-16. Although each of these applicants had "substantial experience as a bartender" and was "qualified to be hired" (Pet. App. C, Findings of Fact 13-15, 23), all were rejected. Instead, Stathis contacted a former employee and solicited a referral from him. This referral, who was white, was hired on June 22, 1979. Stathis again used private referrals to find white replacements when the individual hired on June 22, and then his successor, left petitioner's employ. Pet. App. C, Findings of Fact 17-20.

In 1981, the Equal Employment Opportunity Commission (EEOC) brought suit against petitioner, alleging that it had violated Section 703(a) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(a)) by discriminating against the black bartenders. After a three-day trial, the district court found that, between 1965 and 1980, petitioner had employed at least 30 bartenders, none of whom was black. The court also concluded that Stathis had failed to hire any blacks to fill "front of the house" positions such as bartender, waitress or busboy, and had told the departing bartender in June 1979 — who left petitioner's employ to work at the Union — that he should not refer any blacks to fill his job. Pet. App. C, Findings of Fact 6, 7, 14.

Against this background, the court concluded that petitioner "intentionally discriminated against the three black bartenders" (Pet. App. C, Conclusion of Law 7). The court noted that each of the black applicants was qualified for the job, and that "absent discrimination each one * * * could have been hired to fill [petitioner's] June, 1979, vacancy." Each was denied the position, however, while petitioner "continued to seek applications from non-blacks with

similar qualifications." Pet. App. C, Conclusions of Law 15, 2.[2] Finally, the court found that petitioner's asserted reasons for declining to hire the black applicants "were a pretext for discrimination" (Pet. App. C, Conclusion of Law 5). The court therefore allocated a back pay award among the black applicants, and enjoined petitioner from discriminating against blacks in its future recruiting and hiring.[3]

The court of appeals affirmed in an unpublished opinion. (Pet. App. A). It concluded that the district court's finding of intentional discrimination "is amply supported by the record," adding that the black applicants were not required to prove that they were better qualified than the persons who eventually were hired because petitioner did not "compare[] the legitimate qualifications of a pool of applicants and select[] the better qualified" (*ibid.*). The court of appeals also rejected petitioner's argument that it was the Union that injured the black bartenders by failing to resubmit their names to petitioner. The court noted that petitioner could have requested the Union to refer any of the applicants, and held that each of the applicants adequately had attempted to mitigate his damages (*ibid.*).

2. Petitioner principally argues that the Commission failed to establish that the black applicants would have been hired in the absence of discrimination (Pet. 7-14). This contention is without merit and does not warrant further review.

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[2]There is no support whatsoever in the lower court findings for petitioner's assertion that the black applicants "were proven to be less qualified than the bartenders actually hired" (Pet. 21).

[3]Because the court was unable to determine which of the black applicants would have filled the vacancy in the absence of discrimination, it divided one back pay award among the three (Pet. App. C, Conclusion of Law 16). Petitioner has not challenged this method of allocation.

Read as a whole, the district court's opinion plainly establishes that petitioner would have employed one of the black bartenders had its hiring policy not been discriminatory. Thus, the court explained that each of the bartenders was qualified, that each "could" have been hired, and that one "should" have been hired. Pet. App. C, Finding of Fact 23; Conclusions of Law 15, 16. The court also found that all of petitioner's asserted reasons for rejecting the black applicants were pretexts for discrimination. Pet. App. C, Finding of Fact 24; Conclusions of Law 5, 6. Because the court found that each of the black applicants was qualified, and that each was rejected solely for discriminatory reasons, the obvious import of its conclusions is that one of the black applicants would have been hired absent petitioner's discrimination. In these circumstances, an award of back pay undoubtedly was proper. See *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-256 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973).[4]

Given this background, petitioner is incorrect in arguing that the Commission could prevail only by establishing that the black applicants were better qualified than the white bartender who finally was hired. As the court of appeals noted, petitioner did not claim to have hired the white

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[4]Petitioner is incorrect in suggesting that there is disagreement among the circuits on this point (see Pet. 8). While the issue was once an open one in the Ninth Circuit (see *League of United Latin American Citizens* v. *City of Salinas Fire Department*, 654 F.2d 557, 558 (9th Cir. 1981)), it is now plain that both the District of Columbia and the Ninth Circuits permit the award of back pay only to Title VII claimants who would have been hired in the absence of discrimination. Compare, *e.g.*, *Day* v. *Mathews*, 530 F.2d 1083, 1084-1085 (D.C. Cir. 1976) with *Muntin* v. *California Parks & Recreation Department*, 671 F.2d 360, 363 (9th Cir. 1982). Given the district court's finding that discrimination led petitioner to refuse to hire the black bartenders, they would have recovered back pay in either circuit.

rather than the black applicants because it compared their applications and found that the former had superior qualifications. Cf. *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 358 n.44 (1977). To the contrary, petitioner rejected the qualified blacks out-of-hand before soliciting an application from the white bartender who ultimately was hired. While an employer may of course "choose among equally qualified candidates," it may not base its choice "upon unlawful criteria." *Burdine,* 450 U.S. at 259. The record establishes that petitioner did precisely that in this case. Indeed, here, just as in *McDonnell Douglas Corp.,* the employer rejected qualified minority applicants in favor of leaving the position open and continuing to seek applicants of similar qualifications. See 411 U.S. at 802.

3. Petitioner also is incorrect in suggesting that its back pay liability should have been terminated by the Union's failure to refer the black applicants for employment a second time.[5] The record establishes that, after it rejected the black bartenders in June 1979, petitioner declined to call the Union for referrals (Pet. App. C, Findings of Fact 18-20); the lower courts also found that petitioner at any time could have requested the Union again to refer the three black applicants (Pet. App. A). In any event, petitioner has pointed to nothing in the record that would have led the Union to believe that petitioner was prepared to reconsider

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[5]Petitioner presumably means to suggest that the Union should have again referred the black bartenders when the white bartender who was hired on June 22, 1979, left petitioner's employ. To the extent that petitioner also intends to argue that the Union controlled petitioner's hiring practices (see Pet. 16), its contention is inconsistent with the record: the district court found that petitioner rejected the black applicants referred by the Union, and circumvented its collective bargaining agreement by consulting former employees rather than the Union to obtain the names of white applicants. See Pet. App. C, Findings of Fact 17-22.

applicants that it already had rejected. Thus it was properly found to have been petitioner's conduct, rather than that of the Union, that led to the injury here.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1985

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[6]Despite petitioner's argument to the contrary (Pet. 17-19), nothing in *Ford Motor Co.* v. *EEOC*, 458 U.S. 219 (1982), makes the award of back pay in this case inappropriate. *Ford* involved the effect on back pay liability of an employer's unconditional offer of employment to Title VII claimants. Petitioner made no such offer to the black bartenders — and both lower courts found that the applicants had made adequate attempts to mitigate their damages. Pet. App. A; Pet App. C, Conclusion of Law 17.

DOJ-1985-01